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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GEN-PROBE INCORPORATED,

Plaintiff,

v.

VYSIS, INC.,

Defendant.

No. 99cv2668 H (AJB)

**DECLARATION OF STEPHEN P. SWINTON IN
SUPPORT OF GEN-PROBE INCORPORATED'S
MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

Date: February 20, 2001
Time: 10:30 a.m.
Dept.: Courtroom 1

I, Stephen P. Swinton, declare as follows:

1. I am an attorney at law, licensed to practice before the Courts of the State of California and admitted to practice before this Court. I am a partner in the law firm Cooley Godward LLP, counsel of record for Plaintiff Gen-Probe Incorporated ("Gen-Probe"). I am lead trial counsel for Gen-Probe, and I have been substantially involved in the preparation of this matter for trial. If called as a witness in this matter, I could and would competently testify to the matters set forth below:

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8. On April 10, 2000, Gen-Probe filed its response to the Motion to Stay and therein referred to some of the inequitable conduct theories contained in the [Proposed] Second Amended Complaint that it attached hereto as Exhibit 7. A true and correct copy of Gen-Probe's Memorandum Of Points And Authorities In Support Of Gen-Probe Incorporated's Response To Vysis' Motion: (1) For A Stay Of Proceedings And, Alternatively, (2) To Dismiss Count Four Under Federal Rule Of Civil Procedure 12(b)(6), is attached hereto as Exhibit 3.

9. On April 28, 2000, the Court denied Vysis' Motion to Stay.

10. After the Court denied the Motion to Stay, Gen-Probe resumed its discovery efforts.

11. On May 17, 2000, Vysis served its Second Set of Interrogatories Nos. 3-9 to Gen-Probe, Incorporated, wherein Vysis included interrogatory number 7, which demanded that Gen-Probe "State in detail each factual and each legal basis for Gen-Probe contention that the '338 patent is unenforceable, including each unenforceability contention advanced by Gen-Probe in briefing on Vysis' motion for a stay of these proceedings." A true and correct copy of Gen-Probe Incorporated's Objections and Responses to Vysis, Inc.'s Second Set of Interrogatories, which sets out the language of this interrogatory, is attached hereto as Exhibit 4.

12. On June 7, 2000, the Third Party Witnesses served Gen-Probe with their written responses to the Subpoenas.

13. On June 20, 2000, Gen-Probe served its response to Vysis' Second Set of Interrogatories, and, in particular, provided a response to interrogatory number 7. As noted above, a true and correct set of Gen-Probe's responses to Vysis' interrogatories are attached hereto as Exhibit 4.

14. Also on June 20, 2000, Vysis served its written responses to Gen-Probe's Document Requests and interrogatories.

15. Thereafter, the parties, including the Third Party Witnesses, agreed to endeavor to complete the actual production of responsive documents by mid-November 2000.

16. In or about early October 2000, Gen-Probe noticed the depositions of Vysis and BP Amoco's Rule 30(b)(6) designees on issues relating to the prosecution of the various patent applications that led to the '338 (the "Rule 30(b)(6) Patent Prosecution Depositions"). These

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1 depositions were to be held in late October 2000. Gen-Probe believed that the information it
2 would gather during these depositions would help to confirm its suspicions that Vysis had engaged
3 in inequitable conduct with respect to the '338 patent.

4 17. Several days in advance of the Rule 30(b)(6) Patent Prosecution Depositions, per
5 Gen-Probe's request, Vysis produced to Gen-Probe files it had maintained with respect to the
6 prosecution of several patent applications related to the '338 patent.

7 18. On October 26 and 27, 2001, Gen-Probe deposed Vysis and BP Amoco's 30(b)(6)
8 designee on the prosecution of the '338 patent, Norval Galloway. During the Rule 30(b)(6) Patent
9 Prosecution Depositions, Gen-Probe for the first time learned certain facts contained in the
10 [Proposed] Second Amended Complaint, and confirmed other facts contained therein.

11 19. Although Gen-Probe learned additional facts to support its allegations of
12 inequitable conduct during the Rule 30(b)(6) Patent Prosecution Depositions, Gen-Probe
13 determined that it would be appropriate to defer seeking leave to amend until after Vysis produced
14 all of the documents responsive to the Document Requests and the Third Party Witnesses produced
15 all of the documents responsive to the Subpoenas.

16 20. In mid-November and early December 2000, Vysis produced to Gen-Probe
17 approximately 100,000 pages of documents.

18 21. Gen-Probe immediately undertook to review these documents and completed its
19 initial review of those documents in early January 2001.

20 22. On January 16, 2001, Vysis produced an additional eight banker's boxes of
21 documents, which boxes contain approximately 20,000 additional pages of responsive documents.

22 23. Vysis has not yet noticed or taken any depositions in this matter.

23 24. Attached hereto as Exhibit 5 is a true and correct copy of the Scheduling Order
24 issued in this matter.

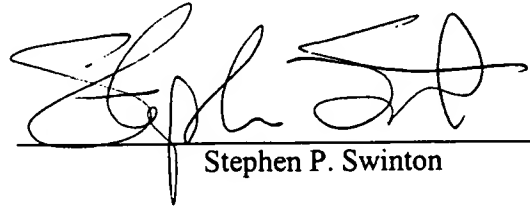
25 25. Attached hereto as Exhibit 6 is a true and correct copy of a Declaration Norval
26 Galloway, which Vysis filed earlier in this case, wherein Mr. Galloway states that he is Vysis'
27 primary in-house patent prosecution attorney and that he possesses detailed knowledge about the
28 patent-in-suit.

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26. Attached as Exhibit 7 to this Declaration is the original copy of Gen-Probe's
[Proposed] Second Amended Complaint.

I declare under penalty of perjury of the laws of the United States that the foregoing is true
and correct and that I executed this declaration in San Diego, California on January 19, 2001.


Stephen P. Swinton